were prepared to claim interest at the rate of 8% pa only from one month after the date of the service of the bill upon the clients which was 13 September 1988 to date of taxation.

In all the circumstances, I would grant the application and set aside the order of the senior assistant registrar dated 28 June 1990 allowing, on review of taxation, the sum of $40,454.15 (inclusive of allocatur fees) and restore her earlier order dated 15 March 1990 allowing, on original taxation, the sum of $65,658.45 but this will be exclusive of the allocatur fees. There will also be consequential orders entitling the taxing solicitors to payment of interest at the rate of 8% pa on disbursements and costs incurred by them with effect from 13 September 1988 that being the date of expiry of one month from date of the service of the bill on the clients, and interest after taxation at the rate of 8% pa from date of taxation to date of payment. (See *Liau Kim Lian* v *Bajuria*.[13])

Finally, the clients must also pay the taxing solicitors the costs of the proceedings both here and before the senior assistant registrar.

Application allowed.

Solicitors: *Wong-Chooi & Mohd Nor; Presgrave & Mathews.*

Reported by *PS Ranjan*

Development & Commercial Bank Bhd v Brimal Sdn Bhd (Syarikat Oriental Elastic Industries, Third Party)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO C548 OF 1985
ZAKARIA YATIM J
22 OCTOBER 1990

Negotiable Instruments — Bills of exchange — Bill of exchange dishonoured upon presentment — Whether plaintiff had capacity or title to bring action — Whether defendant had to be given notice of dishonour — Whether plaintiff entitled to enter summary judgment against the defendant — Defences against claim on bill of exchange — Bills of Exchange Act 1949 (Rev 1978), ss 2, 3(1), 17(1), 38(a), 47 & 48

This was a hearing in open court for further arguments pursuant to an appeal against an earlier decision dismissing the plaintiff's application to sign final judgment against the defendant for a sum of $306,428.34 together with interest on the principal sum of $255,000 at 18% pa from 3 October 1984 till date of final payment and costs.

The defendant was the acceptor of a bill of exchange drawn by Oriental Elastic Industries Company ('OEIC') and indorsed by OEIC to the plaintiff. The bill was presented to the defendant for payment but was dishonoured. The plaintiff therefore claimed for the amount owing in respect of the dishonoured bill and interest. The defendant denied all the plaintiff's allegations in the statement of claim, claiming: (i) that the plaintiff had no capacity or title to bring the present action as plaintiff; (ii) that it was not given any notice of dishonour for non-payment in accordance with the provisions of the Bills of Exchange Act 1949 (Rev 1978) ('the Act'); and (iii) that all its liabilities under the bill of exchange had been discharged by subsequent payments made by the defendant to the drawer of the bill.

Held, allowing the appeal:

(1) The plaintiff was under no obligation to give the defendant notice of dishonour. Under s 48 of the Act the plaintiff was only required to give notice of dishonour to the drawer of the bill.

(2) Under s 38(a) of the Act one of the rights and powers of the holder of a bill of exchange is that he may sue on the bill in his own name. The word 'holder' is defined in s 2 as the payee or indorsee of a bill of exchange. The plaintiff was the holder of the bill of exchange in the present case and was therefore entitled to sue the defendant on the bill in the plaintiff's name.

(3) There was neither fraud nor illegality or failure of consideration pleaded in the statement of defence. The defendant therefore had no defence to the plaintiff's claim and the plaintiff was therefore entitled to enter summary judgment against the defendant under O 14 of the Rules of the High Court 1980.

[Bahasa Malaysia summary

Ini adalah satu pembicaraan dalam mahkamah terbuka bagi hujah lanjut berikutan dengan suatu rayuan terhadap suatu keputusan terdahulu menolak permohonan plaintif untuk memasukkan penghakiman muktamad terhadap defendan untuk wang sejumlah $306,428.34 bersama-sama dengan faedah atas jumlah pokok, $255,000 pada 18% setahun dari 3 Oktober 1984 sehingga tarikh pembayaran terakhir dan kos.

Defendan adalah penerima satu bil pertukaran yang dikeluarkan oleh Oriental Elastic Industries Company ('OEIC') dan diindos oleh OEIC kepada plaintif. Bil tersebut dikemukakan kepada defendan untuk bayaran tetapi telah tidak dilayan. Dengan itu, plaintif menuntut jumlah yang terhutang berkenaan dengan bil yang tak dilayan itu dan faedah. Defendan menafikan semua pengataan plaintif dalam pernyataan tuntutan, ia menghujah: (i) bahawa plaintif tidak mempunyai keupayaan atau hak membawa tindakan ini sebagai plaintif; (ii) bahawa ia tidak diberi sebarang notis ketidaklayanan kerana tidak membayar menurut peruntukan-peruntukan Akta Pertukaran Bil 1949 (Rev 1978) ('Akta itu'); (iii) bahawa semua tanggungannya di bawah bil pertukaran itu telah dilepaskan dengan bayaran terkemudiannya yang dibuat oleh defendan kepada pengeluar bil itu.

Diputuskan, membenarkan rayuan:

(1) Plaintif tidaklah di bawah sebarang obligasi untuk memberi kepada defendan notis ketidaklayanan. Di bawah s 48 Akta itu, plaintif hanyalah diperlukan memberi notis ketidaklayanan kepada pengeluar bil itu.

(2) Di bawah s 38(a) Akta itu, salah satu daripada hak-hak dan kuasa seorang pemunya satu bil pertukaran adalah bahawa dia boleh menuntut atas bil itu dalam nama dirinya sendiri. Perkataan 'pemunya' adalah didefinasikan dalam s 2 sebagai 'payee' atau 'indorsee' sebuah bil pertukaran. Plaintif adalah pemunya bil pertukaran dalam kes ini dan adalah berhak mendakwa defendan atas bil itu dalam nama plaintif.

(3) Tidak ada fraud ataupun kepenyalahan undang-undang atau kegagalan balasan yang dipli dalam pernyataan pembelaan. Justeru itu, defendan tidak ada pembelaan kepada tuntutan plaintif dan dengan itu, plaintif berhak memasukkan penghakiman terus terhadap defendan di bawah A 14 Kaedah-Kaedah Mahmakah Tinggi 1980.]

Case referred to

1 *Nova (Jersey) Knit Ltd* v *Kammgarn Spinnerei GmbH* [1977] 2 All ER 463 (folld)

Legislation referred to

Bills of Exchange Act 1949 (Rev 1978) ss 2, 3(1), 17(1), 38(a), 47, 48

Rules of the High Court 1980 O 14

LT Rasa-Ratnam for the plaintiff.
CT Lee for the defendant.

Cur Adv Vult

Zakaria Yatim J: This is an appeal by the plaintiff against the decision of the senior assistant registrar, who refused to grant the plaintiff's application to sign final judgment against the defendant for a sum of $306,428.34 together with interest on the principal sum of $255,000 at 18% pa from 3 October 1984 till date of final payment and costs.

The appeal was heard in chambers. After hearing the arguments of both counsel for the plaintiff and the defendant I dismissed the appeal with costs. At the request of counsel for the plaintiff I adjourned the matter into open court for further arguments.

According to the statement of claim, the defendant was an acceptor of a bill of exchange No KULBPM 83198 dated 21 March 1983 for a sum of $255,000 ('the bill'). The bill was drawn by Oriental Elastic Industries Co ('the company') to mature on 18 August 1983 and indorsed by the said company to the plaintiff. The bill was presented to the defendant for payment but was dishonoured. The plaintiff protested. The plaintiff's claim against the defendant is for a sum of $306,428.34 as at 2 October 1984 being the amount owing in respect of the bill which was dishonoured by defendant. The particulars of the claim are as follows:

1 Principal amount due on 18 August 1983	$	255,000
2 Postage and stamp duty	$	16
3 Interest at 13% pa from 18 August 1983 to 28 August 1983	$	908.22
4 Interest at 18% pa from 28 August 1983 to 2 October 1984	$	50,427.12
5 Notarial and disbursement charges	$	77
Total		$306,428.34

The plaintiff also claims interest on the principal sum at the rate of 18% pa from 3 October 1984. The plaintiff, through its solicitors wrote an AR registered letter on 11 October 1984 to the defendant demanding payment of the sum owing to the plaintiff by the defendant. But the defendant failed to pay the said sum or any part thereof.

In the statement of defence, the defendant denies all the allegations contained in the statement of claim. According to the defendant, the plaintiff had no capacity or title to bring the present action as plaintiff. Alternatively, the defendant contends that it was not given any notice of dishonour for non-payment in accordance with the provisions of the Bills of Exchange Act 1949 (Rev 1978) ('the Act'). The defendant further contends that all its liabilities under the bill had been discharged by subsequent payments made by the defendant to the drawer of the bill during the period between 1 February 1984 and August 1984.

It is clear that the plaintiff's claim arises from the bill referred to in the statement of claim. A copy of the bill is exhibited to the affidavit of Mr Wu Foong Chung affirmed on behalf of the plaintiff on 19 April 1985. The bill is dated 21 March 1983. On the bill it is written, 'At due date 18 August 1983 pay this First of Exchange...to the order of Development and Commercial Bank the sum of Ringgit: Two hundred fifty five thousand only...'. The bill is drawn by the company and it is addressed to Brimal Sdn Bhd, the defendant. It is not in dispute that this is a valid bill of exchange as envisaged in s 3(1) of the Act. The section states:

> A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a

sum certain in money to, or to the order of, a specified person, or to bearer.

The bill was duly presented to the defendant for payment on 14 May 1984 but it was dishonoured. This is stated in the note of protest dated 14 May 1984 signed by a notary public, which is exhibited to Wu Foong Chung's affidavit. The note of protest, inter alia, states:

> On Monday, 14 May 1984, I, Chin Yoong Chong, Notary Public, duly authorized under the Notaries Public Act 1959 and practicing at Kuala Lumpur, Federal Territory, at the request of Development And Commercial Bank Berhad Kuala Lumpur, the holder of the First of Exchange dated 21 March 1983, did cause due and customary presentation to be made of the said First of Exchange whereof a true copy is written on the reverse side unto Brimal Sdn Bhd, Lot 3291 5¼ Miles, Jalan Kapar, Kelang, upon whom the same is drawn and by whom the same was accepted, during the usual business hours at the premises of Brimal Sdn Bhd, aforesaid, and my clerk did exhibit the said First of Exchange and demanded payment thereof to which Mr Tan Ooi Lee, the accountant made reply to the demand for payment in that he would not pay but said that the sum of $126,000 had been paid to the suppliers and the balance would be paid as soon as possible.

From the note of protest, it is evident that the bill was duly presented to the defendant but the defendant refused to make payment. The bill was therefore dishonoured for non-payment under s 47 of the Act. It was duly accepted by the defendant as shown on the copy of the bill.

It is contended by the defendant that no notice of dishonour was given to him by the plaintiff. I think the plaintiff is under no obligation to give the defendant notice of dishonour. Under s 48 of the Act, the plaintiff is only required to give notice of dishonour to the drawer of the bill. The section, inter alia, states:

> Subject to this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged:
>
> Provided that —
>
> (a) where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission;
> (b) where a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of subsequent dishonour by non-payment unless the bill shall, in the meantime, have been accepted.

In the present case the drawer is not a party to the suit and the question of giving notice of dishonour to the drawer does not arise. In my view the defendant's contention that he was not given notice of dishonour is misconceived.

Although the bill was presented for payment about eight months after the due date for presentation, the question of delay has not been raised by the defendant. In any event the acceptance of the bill signifies the defendant's assent to the order of the drawer. See s 17(1) of the Act.

Under s 38(a) of the Act, one of the rights and powers of the holder of a bill of exchange is that he may sue on the bill in his own name. The word 'holder' is defined in s 2 as the payee or indorsee of a bill of exchange. The plaintiff is the holder of the bill in the present case. As holder of the bill, the plaintiff is therefore entitled to sue the defendant on the bill in the plaintiff's name.

The question for the court to consider now is whether the plaintiff is entitled to enter summary judgment against the defendant under O 14 of the Rules of the High Court 1980. *The Supreme Court Practice 1985* (Vol 1) a p 144 states:

> In an action on a bill of exchange, the mere assertion by the defendant of fraud or illegality affecting the bill is not in itself enough to entitle him to leave to defend, but equally if the defendant sets out facts supporting a case of fraud or illegality affecting the bill, the mere assertion by the plaintiff that he took the bill in good faith and for value will not in itself deprive the defendant of his entitlement to leave to defend but if the plaintiff's claim to be a bona fide holder for value is uncontested or he can establish such claim by unchallenged or unchallengeable contemporary documents, the plaintiff is entitled to judgment...Bills of exchange are treated as cash and, unless there are exceptional circumstances, where there is an action between the immediate parties to a bill of exchange, judgment will not be held up by virtue of a counterclaim by the defendant...

In *Nova (Jersey) Knit Ltd* v *Kammgarn Spinnerei GmbH*,[1] Lord Wilberforce in his speech at p 470 said:

> ...When one person buys goods from another, it is often, one would think generally, important for the seller to be sure of his price: he may (as indeed the appellants here have) bought the goods from someone else whom he has to pay. He may demand payment in cash; but if the buyer cannot provide this at once, he may agree to take bills of exchange payable at future dates. These are taken as equivalent to deferred instalments of cash. Unless they are to be treated as unconditionally payable instruments... which the seller can negotiate for cash, the seller might just as well give credit. And it is for this reason that English law ... does not allow cross-claims, or defences except such limited defences as those based on fraud, invalidity, or failure of consideration, to be made...In my opinion, this is a straightforward case of an action on bills, to which no admissible defence has been put forward...

I respectfully agree with the passage quoted above. In the present case, neither fraud, nor illegality or failure of consideration has been pleaded in the statement of defence. I have carefully considered the pleadings, the affidavits filed and the submissions of counsel in this case and have come to the conclusion that the defendant has no defence to the plaintiff's claim.

In the circumstances, I set aside the order I made in chambers and allow the appeal with costs. I order that

the plaintiff be at liberty to sign final judgment against the defendant for the sum of $306,428.34 together with interest on the principal sum of $255,000 at 18% pa from 3 October 1984 till the date of judgment and thereafter at 8% pa till the date of realization.

Appeal allowed.

Solicitors: *Skrine & Co; Lek Yan & Co.*

Reported by *Yap Shao Sin*

Ponniah v Sivalingam & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D4-22-322-89
ZAKARIA YATIM J
10 MAY 1990

Trusts and Trustees — Presumption of gift and advancement — Shares allotted to parties — Share certificates retained by donor — Whether donor had intention to give shares to children and wife — Whether evidence given by donor admissible

Civil Procedure — Summary judgment application — Declaration sought — Whether court has jurisdiction to grant declaration

The plaintiff is the natural and lawful father of the first to the seventh defendants and lawful husband of the eighth defendant. The ninth and tenth defendants are companies incorporated in Malaysia in which the plaintiff and the defendants are shareholders.

In 1953, the plaintiff commenced business as a sole proprietor. The business prospered and he incorporated the first company in 1977 and the second in 1979. He transferred all his rights, titles, benefits and interest in the business to the first company ('SFM') and all his immovable assets to the second company ('SSB') in consideration of the two companies issuing 2,000 and 775,003 fully paid up shares respectively to him. Upon issuance, the plaintiff allotted in the names of the first to the sixth defendants, 300 shares each of SFM and 127,500 shares each of SSB. Of the remaining shares in SFM, the plaintiff and eighth defendant were allotted 50 shares each and the seventh defendant was allotted 100 shares. Of the remaining shares issued by SSB the plaintiff and eighth defendant were allotted 5,001 shares each and the first defendant had an extra share. None of the first to eighth defendants paid any consideration for the shares which was solely contributed by the plaintiff. The plaintiff alleged that it was not his intention to allot the shares as an advance or a gift but they were allotted on condition that the first to the seventh defendants held the shares in absolute trust for the plaintiff during his lifetime and thereafter in trust for the eighth defendant for her lifetime and thereafter to the children's respective benefits in proportion to their shareholding.

The plaintiff was at all material times in physical possession of all the share certificates and was also the chairman and managing director of the two companies. However, the day to day running of SFM was entrusted to the first to sixth defendants at various stages but the plaintiff supervised and controlled the management of both companies. The plaintiff also alleged that the first to seventh defendants have conducted the affairs of the two companies in a manner that evinces a manifest intention to appropriate the shares for themselves and to deprive the plaintiff of his beneficial interest. The plaintiff also alleged that the defendants had caused the purported removal of him as director and was excluded from the management of the two companies. Advertisements were placed announcing his removal as director and he was excluded from the premises of the two companies. The assets of SFM were disposed of by the defendants.

In their defence, the fourth to sixth and eighth to tenth defendants denied that the shares were allotted to them as trustees. Further, they contended that valuable consideration was given at the time of allotment, and as shareholders, they had lawfully removed the plaintiff as director. They also averred that the plaintiff and the second and third defendants were being charged for criminal breach of trust of moneys and assets of SFM.

The first defendant averred in his defence that the plaintiff had formed the companies for the purpose of taking advantage of tax benefits and to retain the profits of SFM to buy more assets in SSB. He claimed that he had paid $30,000 for the shares and was responsible for the growth of the two companies since 1979. The plaintiff sought a declaration, inter alia, that the shares were held by the defendants on trust for him.

Held, allowing the plaintiff's application in part:

(1) The principal issue to consider is whether the first to the seventh defendants hold all the shares allotted by SFM in their favour in trust for the plaintiff or whether such allotments were an advancement. It is not in dispute that the English equitable doctrine of advancement has become part of the law of Malaysia.

(2) The plaintiff commenced business as a sole proprietor and as a result of his hard work, the business flourished. The first company was incorporated in order to ensure that his wife would be looked after in the same manner and life style she was accustomed to and ensure that the seventh defendant would be properly married off and the younger children properly educated. As such, the allotment was purely on trust with certain intentions. All the share certificates were kept by the plaintiff and he never gave those certificates to any of the defendants. No consideration was given for the shares and the plaintiff was in full control of the two companies. He utilized the funds without seeking the approval of the shareholders or directors. No complaints were made by any of the directors as to how he conducted the affairs of the companies. His authority was never challenged until recently.

(3) The presumption of advancement could be rebutted by evidence of the transferor. The principal question is to consider what the true intentions of the plaintiff were at the time the shares were allotted in the names of the defendants. From the evidence of the plaintiff which is not seriously disputed by the defendants, it was the intention of the plaintiff to retain the beneficial interest of the shares allotted to the defendants during his lifetime. The conduct of the plaintiff in running the two companies is consistent with his intention. The fact that he retained all the share certificates is most significant.

(4) As the defendants have no defence to the plaintiff's claim, the court can enter summary judgment in terms of the prayers sought although they are for a declaration.

[Bahasa Malaysia summary

Plaintif adalah bapa kandung dan sah defendan pertama hingga ketujuh dan suami sah defendan kelapan. Defendan kesembilan dan kesepuluh adalah syarikat-syarikat yang diperbadankan